SUPREME COURT OF THE UNITED STATES.

No. 593.

WILLIAM L. HEMINGWAY, Treasurer of the State of Mississippi,

SYLVESTER GWINN, Auditor of Public Accounts of said State, and *ex-officio* the Levee Board of Mississippi, District No. 1,

Appellants,

vs.

JEPHTHA W. STANSELL, surviving partner of the late firm of Partee & Stansell.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI.

BRIEF FOR APPELLANTS

By H. P. BRANHAM, Solicitor.

R. & T. A. ENNIS, PRINTERS, 118 AND 120 OLIVE STREET, ST. LOUIS.

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STATEMENT OF THE CASE.

On the 17th day of May, 1871, the Legislature of Mississippi incorporated the Levee Board of District No. 1, giving the board full power to construct, repair and maintain a certain line of levees along a portion of the Mississippi river. That it might do this, it was authorized to borrow money and to issue bonds to the amount of one million dollars, to be negotiable in any market, but in no case to be negotiated at a greater discount than ten per cent. It was also authorized to let out the work, or parts thereof, and cause the same to be done by contract, or otherwise.

On the 28th September, 1871, the board made a contract with Partee & Stansell to do a large part of said work, a portion thereof to be paid for in levee bonds, at the rate of 65 cents per cubic yard, a portion in bonds at 45 cents per cubic yard, and the clearing and grubbing at $45 per acre, also in bonds.

On the same day the board made a similiar contract with E. A. Lindsey, the work to be paid for in bonds at 45 cents per cubic yard, or in cash at 27 cents per cubic yard.

Both contractors entered on their work; but after a short period Lindsey turned over his contract to Partee & Stansell, who undertook the same, with the approbation of the board.

The original contract with Partee & Stansell simply provided for payment in bonds, and, long after it was made, Partee came before the board and claimed that a verbal agreement, outside of the written contract, was made between him and Dr. Dowd (former president of the board, then dead), that they would receive the bonds at 90 cents, and, upon this representation, the board agreed that the bonds should be so paid them, and the secretary of the

board interlined in the written contract the words "at the rate of ninety (90) cents on the dollar," in the following sentence in which said words now occur, viz: "The said party of the second part agree to pay to the party of the first part, for the work above enumerated, the following per cubic yard, in bonds, at the rate of ninety (90) cents on the dollar."

Meanwhile the work was proceeding, and the board, from time to time, made large payments of bonds to Partee & Stansell at 90 cents on the dollar. Partee & Stansell had sublet to numerous sub-contractors great portions of the work, at the rate of 18 to 25 cents per cubic yard, and $30 per acre for clearing and grubbing.

Monthly estimates of the work done, were made by the board's engineer, one Kirkpatrick, and it was on those estimates that the partial payments above mentioned were made.

The work drew to its conclusion. In the meanwhile Kirkpatrick had left the employ of the board, and it had employed another engineer, Mickle by name, and the board becoming satisfied that Kirkpatrick's estimates were excessive and fraudulent, had re-measurements made. When the time for settlement arrived, a controversy arose between the board and Partee & Stansell as to the quantity of work done, the former relying on Mickle's re-measurement, the latter on Kirkpatrick's estimates. This controversy resulted in the payment by the board to Partee & Stansell of $47,800 bonds, balance due, in full of all demands to date, on the 18th of June, 1872, and Partee & Stansell executed their receipt in full to that effect, which receipt the board still holds.

Partee & Stansell subsequently appeared before the board, however, and urged a claim for more compensation. The board, "always willing to do justice, and unwilling to wrong complainants or anyone else," consented to a re-measurement and arbitration, to the extent and on the terms set forth in two instruments of writing to be found on pages 125 and 128 of the transcript. The board

appointed Mickle as one of the arbitrators, Partee & Stansell appointed one Fleece as another, but over the third, or umpire, a controversy arose between Mickle and Fleece, as follows: One stipulation of the agreement to re-measure and arbitrate was, that Partee & Stansell were to notify the board in writing what points they expected to prove before the arbitrators, and what the character of the evidence proposed to be introduced, in order that the board might be ready with its rebuttal. Partee & Stansell gave the notice, whereupon Mickle addressed a note to Fleece claiming that the notice entirely trancended the agreement made. Fleece replied that, in addressing him as "civil engineer," Mickle assumed that the board of arbitration did not exist, and proceeded to discuss that point, expressly waiving the other. A long correspondence relative to the status of Cobb ensued, which resulted in an abandonment of him as a co-arbitrator by Fleece (under protest, however), and a nomination of other engineers for Mickle's acceptance; to which Mickle replied by declining to accept anybody until the question originally raised by himself as to the scope and propriety of the notice aforesaid; and the matter was then and there exploded by a peremptory refusal from Fleece to come to any such understanding, and closing the correspondence.

Partee & Stansell then filed their bill in chancery, claiming a balance due them in bonds of $157,000, and praying a specific performance of the contract. In their bill they claimed that the receipt mentioned above was null and void, because it was extorted from them by duress, and given under protest, and because it was without consideration; and, furthermore, that it was waived and abandoned by the agreement to re-measure and arbitrate; they claim also that the board wrongfully and fraudulently refused to carry out said agreement, and that thereby Partee & Stansell were remitted to all their rights under their original contract.

The board, in its answer, denied that it owed complainants anything, insisting that full payment had been

made for the work done. It denied that said receipt was null and void, or that it was extorted by duress or given under protest, or had no consideration, or that it had been waived or abandoned; denied that it wrongfully and fraudulently refused to carry out said agreement to re-measure and arbitrate, and averred its willingness still to do so, asserting that the matter of difference and cause of trouble was complainant's demand to go beyond the agreement. It asserts that the provision, that the bonds were to be paid out at 90 cents on the dollar, was not in the original contract, but was inserted in the manner and under the circumstances above set forth.

After the institution of the suit, and whilst the same was still pending, the legislature of the State passed, on the 11th day of April, 1876, a bill abolishing the Levee Board of District No. 1, and committing all its affairs to the hands of the State Treasurer and the Auditor of Public Accounts, as a sort of liquidating board. Whereupon, at the June term, 1876, the solicitors of the late board, as such, moved the court to dismiss the suit, because the board was abolished, and was no longer capable of suing or being sued, and for other causes. This motion was over-ruled in July, and the court held that the corporation still existed for the purposes of suit, and that the Auditor and Treasurer, although their domiciles as individuals, and places of business as officers, and as constituted under the act of 1876, were in the Southern District, could yet be brought in to defend this suit.

On the 14th of August, 1877, a bill of revivor was filed against the Auditor and Treasurer, and on 17th of June, 1878, they answered, adopting, for want of personal knowledge, the answer of the original defendants, but answering further, that said contracts with Partee & Stansell, and with Lindsley, were *ultra vires* of the board, and were frauds on the act of 1871, in so far as they fixed the prices of the work at 45 and 65 cents per cubic yard, and $45 per acre, being designed to defeat that clause of the act which prohibited the bonds to be discounted at a

greater rate than 10 cents on the dollar; that the work was worth only 25 and 40 cents per yard, and $25 per acre.

Afterwards, the Auditor and Treasurer filed their cross-bill, claiming that Partee & Stansell had been paid for work largely in excess of what they really did; that they had been paid at rates in excess of what was lawful and proper, and a fraud had been committed on the act of 1871; that the alteration of the contract by the insertion of the 90 cents clause was unlawful, and the bonds paid out ought to be counted at par, and praying that the over-payment of bonds, amounting to $189,547.20, be decreed to be repaid by Partee & Stansell.

The pleadings were all made up, and the cause came up for final hearing, when the court decreed in favor of complainants the sum of $71,623.67 and costs, and this appeal was then taken.

Those parts of the acts of 1871 and 1876 pertinent to this cause are appended. The act of 1871 is printed in full in transcript, page 82 *et seq.*

82 An act to redeem and protect from overflow from the river Mississippi, certain botton lands herein described.

SECTION 1. Be it enacted by the legislature of the State of Mississippi, that a board of commissioners, to be styled "The Levee Board of the State of Mississippi, District No. 1," to consist of five members, one of whom shall reside in each of the counties of Tunica, Coahoma, Tallahatchie, Panola and DeSoto, shall be elected by the board of supervisors of their respective counties, and they and their successors in office shall constitute, and are hereby declared to be, a body politic and corporate by the name and style aforesaid, and by said name may sue and be sued, plead and be impleaded, contract and be contracted with, and have perpetual succession, for the purposes hereinafter designated. They may have a common seal, and alter and change the same at pleasure; they may from time to time make such by-laws and regulations, and alter and change the same as they may deem proper, not inconsistent with

this act and the laws of the State, for the purposes of carrying into effect the objects of this act; they shall elect a treasurer, secretary and engineer, and from one of their own number a president, and such other officers and agents, and employ such persons as they may deem necessary for the efficient conduct and management of their business; they may do all acts and things not inconsistent with
83 this act and the laws of the State that may be proper to effect the purposes and objects of this act.

SEC. 3. Be it further enacted, That said board of levee commissioners shall have power and are hereby required to contract, repair and maintain a levee on or near the east bank of the Mississippi River, extending * * * Said board shall determine the base, height, slope and elevation of said levees, and, as they may deem necessary, change the same. They may abandon any portion of any levee now built or to be constructed that they may deem unsafe or improperly constructed, and may build new levees on such ground as they may select, and repair old levees, as they may deem proper, and make all needful rules and regulations, and do all acts as they may deem necessary to carry into effect the objects and purposes of this act. They shall have power to let out such works or parts, thereof, and cause the same to be done by contract, or otherwise, as they may deem proper.

SEC. 6. *Be it further enacted*, That the domicile of said Board of Levee Commissioners shall be at the county seat of Tunica county; and that said board of Levee Commissioners shall hold their regular meetings at the said town of Austin, Tunica county, on the first Monday of April and September of each year, and at such other times and places as they may appoint, and they may be called together by the President on ten days notice of the time of meeting; a majority of said board shall constitute a quorum to transact all business.

SEC. 9. *Be it further enacted*, That for the purposes aforesaid, and to enable them to carry out the purposes of this act, the said Board of Levee Commissioners shall have

power to borrow money, and to that end may issue the bonds of said board to the amount of 1,000,000, in such sums and denominations, not less than $100 each, as the said board may prescribe, which bonds shall be signed by the President and countersigned by the treasurer of said board, and be made payable to order, or to bearer, in not less than two nor more than ten years after the first day of January, 1871, and shall bear a rate of interest not exceeding eight per cent. per annum, for which interest coupons may be attached, payable at such time and place as the board may contract. Said bonds shall be negotiable as promissory notes or bills of exchange, and may be sold and negotiated in any market, in or out of the State, on the best terms that can be obtained for the same, but in no case shall any of them be negotiated or sold at a greater discount than ten per cent. * * * * * * * * All moneys borrowed by said board, or arising from negotiation or sale of any of said bonds, shall be promptly paid into the treasury of said board, and shall constitute a levee fund, and be used and applied to carry into effect the objects and purposes of this act.

Approved March 17, 1871.

AN ACT TO ABOLISH THE LEVEE BOARD OF DISTRICT NO. 1 AND TO PAY THE DEBTS OF SAID BOARD.

SECTION 1, *Be it enacted by the Legislature of the State of Mississippi*, That the offices of commissioners, secretary, treasurer and collector of levee District No. 1, as now existing and organized under the laws of this State, approved March 17, 1871, be and the same are hereby abolished. And the Auditor of Public Accounts and the Treasurer of the State, be and they are hereby constituted and appointed the Levee Board of District No. 1, *ex officio*, with no other salaries, perquisites, or emoluments than now pertain to their respective offices. They shall be responsible on their official bonds for the safe-keeping and proper management of the levee bonds of said district, and discharge all the duties of levee board, secretary and

treasurer of same, and all laws and parts of laws touching the Levee Fund of District No. 1, the collecting and disbursement of the tax levied on account of said district; shall operate and be as binding upon them as upon the commissioners, secretary and treasurer of said district, *it being the intent and purpose of this act to substitute the Auditor of the State and the Treasurer thereof, ex officio, as such commissioner, secretary and treasurer in place and stead of the Board of Levee Commissioners, secretary and treasurer of Levee District No. 1 now in office.*

SEC. 2 *Be it further enacted*, That the State Treasurer shall keep a separate book, or books, in which all the transactions and records of the property and status of the levee funds of said District No. 1 shall be kept, and he shall be the actual custodian of the money and assets belonging to the said fund, and shall bear toward it the same relation which he does to the State funds. The Auditor shall act in the capacity of Auditor thereto, and the existing rules, regulations and accounts, as to the State funds, shall apply, as far as practicable, to the said levee fund, but the said rules and regulations may be simplified by the said Auditor and Treasurer, with the approval of the Governor, if it can be done without removing the proper checks which should exist on the part of one against the other; an annual account of the receipts, disbursements, debts, property, assets and liabilities of said Levee District No. 1, shall be contained in official reports of the Auditor and Treasurer to the Legislature.

SEC. 6. *Be it further enacted*, That hereafter the taxes levied and assessed for said District No. 1 shall be collected by the Sheriffs of the several counties composing said district, at the same time as the State and county taxes. * *

SEC. 9. *Be it further enacted*, That the Auditor and Treasurer shall have full power to settle up, under the laws now in force, the unfinished business of the said levee board of District No. 1, and to pay any outstanding liabilities of the same in such funds as may be applicable to the same, and if, at any time, there shall be in the hands of the

treasurer any sum of money to the credit of said levee fund of District No. 1, he shall use the same in the payment of debts not secured by bonds, and the surplus, if any, in buying in the outstanding bonds or coupons of Levee District No. 1 to the best advantage. * * * * *

SEC. 11. *Be it further enacted*, That all acts and parts of acts in conflict with the provisions of this act be and the same are hereby repealed; and that this act take effect and be in force from and after its passage.

Approved April 11, 1876.

ASSIGNMENT OF ERRORS.

Appellants assign the following for error in this cause: First. The court erred in not dismissing the bill when so moved to do by the counsel of the Levee Board District No. 1.

2nd The court erred in disregarding the receipt in full of 18th June, 1872, and in directing an account to be stated on any basis.

3rd. The court erred in allowing 10 per cent. discount on the bonds paid Partee and Stansell.

4th. The court erred in allowing the account to be stated on a basis of 45 cents and 65 cents per cubic yard for earthwork, instead of the proper basis of 27 cents and 40 cents respectively, and of $45 per acre for clearing and grubbing, instead of $30.

H. P. BRANHAM,
Solicitor for Appellants.

ARGUMENT FOR APPELLANTS.

1. *The court erred in not dismissing the bill when so moved to do by the counsel of Levee Board District No, 1. Transcript, page 87.*

By the act of the Mississippi Legislature, approved April 11, 1876, and entitled "An act to abolish the Levee Board of District No. 1, and to pay the debts of said board," the said levee board, the defendants in this suit, as then existing and organized, was abolished; and the Auditor and Treasurer of the State, *ex officio*, were constituted and appointed the Levee Board of District No. 1.

We contend that the effect of this statute was: 1st, to abolish the levee board altogether, *as such;* 2nd, that the State Auditor and State Treasurer, *as such*, were charged with the duties of said board; 3rd, that, whilst the debts of the board were not nullified by said statute, yet all pending suits against it were abated, as by the death of a natural defendant; 4th, that new suits must be begun against the Auditor and Treasurer as such, and not a mere revivor of the suit pending, for the reason that both of these officers reside at Jackson, in the Southern district, and kept their offices there. One fallacy, in the opinion of the court, on this motion consisted in the two-fold assumption that the Auditor and Treasurer were the same corporation as the original Levee Board, and that the Levee Board, as a corporation, were in court at the time of the motion. Another fallacy was that because "no provision is made for the ascertainment of what is due to the board, or due by it to others, than through the courts; and it is not to be presumed that the Legislature intended to deprive any of those claiming to be the creditors of the board, or having any contro-

versy with it, from having their rights ascertained and enforced. For these purposes the corporation still exists," etc.

The Auditor and Treasurer, if by this act they were created a corporation at all (which is very gravely to be doubted) were yet not the same corporation as the original board, but a different one entirely, and was a mere liquidating board.

Bellows v. Hollowell, etc., Bank, 2 Mason, 31.

The original Levee Board was not in court at the time of the motion. It was abolished, defunct, and just as much out of court as any deceased natural defendant. Neither were the Auditor and Treasurer in court as successors. And both these propositions the complainants recognized and acted on when they filed a bill of revivor and issued process to bring in the Auditor and Treasurer.—*Transcript, page* 128.

It was never contended by appellants that "the Legislature intended to deprive any of those claiming to be creditors of the board from having their rights ascertained," etc. The question raised was merely one of practice, and the claim was that the ascertainment must be by original suit in the Southern district against the Auditor and Treasurer as such.

2. *The court erred in disregarding the receipt in full of 18th June, 1872, and in directing an account to be stated on any basis.*

It is a conceded fact in the case that, on the 18th June, 1872, complainants executed to the board a receipt as follows:

"MEMPHIS, June 18, 1872.

"Received of A. R. Howe, Treasurer Mississippi Levee Board, District No. 1, forty-seven thousand eight hundred dollars, on account of work on levee, the same being full of all demands to date.

"PARTEE & STANSELL,
Contractors."

"$47,800.00.

Anticipating that this receipt would be produced in response to their claim, complainants in their bill, *pages 13 and 14 of transcript, seek to evade it by claiming, first, that it was extorted from them by oppression and wrong, and was given under protest; secondly, that it was without consideration; thirdly, that it was abandoned and complainants remitted to all their rights under the original contract by a subsequent agreement to arbitrate, and a violation of that agreement by defendants.

1st. Defendants, in their answer, sworn to by four of them, positively deny that said receipt was executed either under duress or under protest. See page *72, Transcript. Under this denial the burden is on complainants to prove the duress and protest, and to prove it by at least two winesses. Yet only one witness speaks to this point, J. W. Stansell, in his answer to 17th int., p. *226 of Transcript; and even this one witness, in his answer to 26th cross-interrogation, page *239 of Transcript, says in terms that he did not give this matter any attention, and knew very little about it, that the receipt was given by Mr. Partee, and says by implication that he was not present at the time. Now it is noteworthy that, although his deposition was taken, Partee says not one word about this receipt, or any duress or any protest connected with it; he does say, however, that he received the payments that were made. See answer to 2nd interrogatory, page *203 of Transcript.

2nd. The effect of this receipt is also sought to be avoided by calling it a release, and then setting up a want of consideration. The instrument is not a release, but a receipt simply, showing a final adjustment and settlement of all the business matters up to date; and, in the absence of any duress, fraud, accident or mistake (and none of these objections are made, except the duress), is conclusive.

3rd. The bill further claims that defendants, in effect, have conceded that said "acquittance or release" was null and void, and have waived and abandoned the same,

by entering into the arbitration agreement of 4th October, 1872, and that complainants are remitted to their rights under the original contracts by defendant's violation of that agreement. The answers to this proposition are various. First, the arbitration agreement itself, signed by Partee & Stansell, recites a complete settlement in full, evidenced by the receipt given, "and said party of the second part do *now* come forward and complain that injustice was done," etc. See p. *125 of Transcript. Not a word of doubt cast on the legal validity of the receipt, or any claim of that sort made, or any abandonment of it by the board, but on the contrary a reiteration of it as a full and complete settlement. True, the board consent, because of its "desire" to do "full justice to all men," to a re-measurement and further payment, if anything further is ascertained to be due on re-measurement. This consent of the board, however, it could only validly give in the event that the receipt was fraudulently obtained, because the board was a special agent of the State, with strictly limited powers, and could waive no valid settlements, and to produce that consent in proof of the fraud, is to argue in a circle.

Besides, what was the consent it gave? It was "to measure all work done by said party of the second part (complainants) on said levee," and that "in the adjustment of questions pertaining to this measurement, the contractors shall have the privilege of introducing all proper evidence, oral or written, of notes, profiles, or other evidence, which testimony may be rebutted by the president of the board. This testimony being allowed to give the engineers information as to the fills or any other fact not perceptible to the engineers," &c. Transcript *pages 41 and 42. Further, that "*before further proceeding with the measurement* (the said second party shall) notify the first party in writing what points they expect to prove, and the character of the evidence proposed, so that the said first party may be ready with the rebutting evidence." Transcript page *50.

Such was the agreement. In pursuance of the last stipulation above recited, complainants handed in their notice;

it will be found on page *131 of transcript. It contains twelve specifications, every one of which, except the seventh, third (perhaps), and first two lines of the first, is clearly inadmissable under the agreement. Of this fact complainants' arbitrator, Col. Fleece, was promptly notified by Mr. Mickle, arbitrator for the board, (See *133 of transcript) who notifies Col. Fleece, also, of what is his understanding of the arbitration agreement. This certainly was proper in itself, and was demanded by the terms of the power conferred on the board.

In reply, Col. Fleece declines to come to any understanding on that point, but raises, what he himself afterwards calls, "a side issue" as to the appointment of Cobb as umpire. After a wrangle over that question, which lasted about forty days, the arbitration was broken up by a reiteration by Mickle of the necessity for this understanding, and a peremptory refusal on the part of Fleece to have it. See *pages 155 and 156, transcript.

The bill charges that the defendants (the board) "having wrongfully and fraudulently refused to carry out the said agreement, dated October 4th, 1872, * * your orators are remitted to all their rights under their original contract, and are entitled to receive from the said defendants the balance remaining due according to the original estimates of the said Kirkpatrick," &c. Did the board wrongfully and fraudulently refuse? Let the court read the agreement of October 4th, 1872, on page *125 of transcript; then the additional agreement of December 12th, 1872, on page *128 of transcript; then the communication of Partee & Stansell on page *131 of transcript; then that of Mr. Mickle on page *133 of transcript, and that of Col. Fleece on page *134 of transcript; then that of Mr. Mickle on page *155 of transcript, and that of Col. Fleece page *156 of transcript, concluding the correspondence, and it will be seen that it was really not the defendants who declined to carry out the arbitration, but complainants themselves. The court will please to read the clear, straightforward and emphatic denials and statements on these points of the

answer, sworn to by four defendants, beginning at p. *74 of transcript, and it will see that so far from those denials being overthrown by the proofs, they are sustained.

Clearly Mr. Mickle and the board were right in their claim that Partee & Stansell were endeavoring to introduce before the board of arbitrators matters not comprehended by the agreement, and that this ought not to be done. While it does not appear what the objection of Mr. Mickle to Mr. Cobb was, yet it does appear that while he was at first disposed to accept Cobb, he afterwards saw some reason to decline to do so, and it is clear that Mickle was right in asserting that the board of arbitrament had never been properly organized, and that he had a right so to decline, for in his letter of December 17th, 1872, to Col. Fleece he says: "It was expressly understood by Mr. Partee and myself in Memphis, that the board of arbitrament could not and would not be organized until your suggestion and my acceptance of the third engineer had been officially made in writing." Now, nowhere, either in the correspondence which followed or in the pleadings in the cause, is this statement of Mr. Mickle's denied. It ought to be conclusive of his correctness. Now, when, was it that this understanding was had in Memphis? It was *after* December 5th, and *after* that commencement of work on which the bill lays so much stress, as proving a then existing organization of the board of arbitrators. See Mr. Mickle's letter of December 5th, page *128 of transcript, and see the bill itself, *pages 19-20.

3*d*. *The court erred in allowing 10 per cent. discount on the bonds paid Partee & Stansell.*

The bill charges on this head, "And the said party of the second part did thereby agree to pay to the parties of the first part, for the work above enumerated, the following price per cubic yard, in bonds, at the rate of 90 cents on the dollar," &c. *Transcript, page *4*. The answer states that "this contract, as originally made, did not contain the provision that said work was to be paid for in bonds at 90 cents, or at a discount of 10 per cent. On the contrary,

they say that the original contract simply provided for payment in bonds, and that long after it was made complainants came before the board and claimed that a verbal agreement outside of the written contract, was made between them and Dr. Dowd (former President of the board, then dead) that they should receive the bonds at 90 cents, and upon this representation the board agreed that the bonds should be so paid them, and the secretary of the board interlined in the written contract the words 'at the rate of 90 cents on the dollar,'" &c. *Transcript p. *64.*

The only testimony on this point is that of J. W. Stansell, on *transcript page *212.* He says, "Our bid was accepted as it stood, with those words in it, but they were omitted in the draft of the contract, which was signed by us, with the understanding on both sides that we were to have the bonds at that rate. The words were afterwards inserted by order of the board." On *transcript page *230,* however, he says in response to the question, "Who procured the insertion of the words 'at 90 cents on the dollar' in the contract; when was it inserted; were you present; how do you know it was so understood?" "I don't think I was present when it was done, and do not know of my own knowledge when it was done. When the contract was signed, Dr. Dowd said it was not necessary to insert this provision, because the law provides for the use of the bonds at 90 cents on the dollar. I heard from Mr. Partee that the board agreed to insert the words afterwards. I think the insertion was made after Dr. Dowd's death."

This item involves $48,183.50 of bonds. The bill, sworn to, denies that the contract, as made, contained the 90 per cent. clause, and Stansell admits that fact, but attempts to set up a parol contemporaneous agreement, varying the written contract. This he cannot do. True, the clause was subsequently inserted by the secretary, but this neither he nor the board had any authority to do. To do it was simply to make Partee & Stansell a present of that large amount of the public money.

That is true, taking Stansell's own version of the transaction; but the court cannot accept that version. The sworn statements of the answer must be taken as true until met by the testimony of two witnesses. They are met by only one, and that one confessedly dealing largely in hearsay. It is a pregnant fact, that in the deposition of Partee, complainant, he says not one word on this subject. It seems then, that the board, long after the contract was made, consented to this interlineation, merely on the statement of Partee, made after the death of Dowd, that he had a verbal agreement, not with the board, but with Dowd, a member merely of the board, that the bonds should be paid at 90 cents. A more unauthorized and illegal act on the part of that board would be difficult to conceive, and it is unnecessary to enlarge upon it.

4th. The court erred in allowing the account to be stated on a basis of 45 cents and 65 cents per cubic yard for earthwork, instead of the proper basis of 27 cents and 40 cents respectively, and of $45 per acre for clearing and grubbing, instead of $30.

I cannot state my position on this point any more clearly than it is stated in the cross-bill, and I adopt the following extract therefrom as a part of my brief:

"The said board were trustees, administering a great public trust and acting under purely statutory powers. They had no other powers whatsoever. The only authority which they had to use or to issue bonds was derived from the act of March 17th, 1871, and by the provisions of that act they were expressly forbidden to sell or negotiate said bonds at a discount of more than 10 cents on the dollar. And while the terms of payments fixed by said contracts of 28th September, 1871, pretended to take said bonds at par, and while said writing, signed by said defendants on said day, and as altered by said secretary, as aforesaid, pretends to fix the discount at 10 per centum only, yet all that, your orators aver, was a mere subterfuge. Said contracts of 28th September, 1871, in so far as they fixed the

rates to be paid for said work at 65 cents per cubic yard for the Yazoo Pass Levee, and 45 cents per cubic yard for all all other levees, and $45 per acre for clearing and grubbing, were mere expedients, designed and adopted by said defendants and said Lindsley to avoid and defeat that 10 per cent. discount feature of said act. Said work was not worth more than 25 cents per cubic yard, except, perhaps, the Yazoo Pass work, which may have been worth as much as 40 cents; and said clearing and grubbing were not worth more than $25 per acre. In the very contract for Willow Lake levee, made by Lindsley, and which defendants assumed and undertook, and under which they did one-third of their 45-cent work, it is expressly agreed by Lindsley to do the work for 45 cents per yard in bonds, or for 27 cents in cash (meaning currency). And in the year 1872 these very defendants contracted with the Vicksburg & Nashville Railroad Company to build the embankments for that road for the rates of 35 cents per cubic yard, and of that 35 a large proportion was to be paid in county-aid bonds; that, too, in a region where the soil is harder and more difficult to work than is the soft alluvium of the Mississippi bottom; wherefore, your orators say, that said defendants and Lindsley and said board did unlawfully and in flagrant violation of the intention of said act, and of the rights of tax-payers of said levee district, and in fraud of the provisions of said act, fix such extravagant rates as are hereinbefore described, whereby the discount on said bonds is made to be, not 10 per centum, as by said act is allowed and intended, but nearly 50 per centum. It was clearly the intention of said act that said bonds should be negotiated in the great money markets, and either sold, or money borrowed on them as collateral, and that with such money thus obtained, the work was to be done at cash prices. It was not an unpromising scheme; such bonds were sold in the markets at 90 cents on the dollar, and especially at that time, when all the capital of the world was tending that way. But if not practicable, any other was forbidden by the act itself. It may be that the power to borrow money,

etc., as conferred, carried with it the power to pay the contractors for work directly in bonds; but, if so, always provided that it be fairly and bona fide done; and the evident intent of the act to get for the proporty-holders of the district 90 cents worth of work for $1 in bonds, can not be defeated by a mere piece of legerdemain in drafting a contract.

Your orators, therefore, state that defendants have been paid largely more than their work was worth, and than they should have been paid; that said agreement as to prices was a fraud on said act and the people of said district, and void."

The Willow Lake contract, made by Lindsley and assumed by Partee & Stansell, will be found on page *122 of transcript. Mr. Partee's own deposition, page *206 of transcript, and Mr. Stansell's own deposition, pages *215 and 233, show the assumption of that contract and the terms, and show that "the Willow Lake, Flower Lake and Shelby Ridge work was pretty much the same sort of work." Mr. Stansell, on page *232, says: "We sublet the work at 26 cents per cubic yard, to Kain & Kain; their contract was twenty-five (25) cents. The station-work described was sublet at from 18 to 25 cents per cubic yard." In the preceding page he says, "a part of the Shelby Ridge or Delta levee was let out to be done by stations, say from one hundred to five hundred feet to a squad; I suppose fully one-third of the Shelby Ridge or Delta work was thus let out in stations, and about one-quarter of the Willow Lake work was also let out in this way, by stations; also several stations of the Flower Lake work," &c.

In p. *238 he says: "We paid to these sub-contractors for in the neighborhood of seventy-five acres of clearing, in addition to the above payments. This was also paid in money. The rate paid them for clearing was about $30 per acre, cash."

W. O. Llynn, a witness for Partee & Stansell, on page *186 says:

"At the pass, a man with a wheelbarrow ought to put in at least thirteen yards; if he worked well and long hours, eighteen yards. At Gordon Break, a man with a wheelbarrow ought to have put in at least 11 or 12 yards a day. I know the way the hands were worked whenever I was passing up and down, they ought to have done at least that much. On the repairs, a man ought to have put in at least 8 yards. A man and wagon ought to have put in, at Gordon Break and at the pass, about 50 to 60 yards a day, the wagons to be loaded by other hands than the driver. A man and scraper would put in about 25 yards a day at the pass, where the scrapers were used. In all these estimates I have estimated a day's work at ten hours."

That is to say, that at 65 cents per yard (for that is the price claimed and allowed for "pass" and "Gordon's Break" work), one man with a wheelbarrow ought to do work counting up $8.45, $6.15, or $7.80; if he worked long and well $11.70 a day; a man and wagon, other hands loading, $32.50 to $39.00 per day; a man with a scraper, $16.25 a day.

Finally, Partee & Stansell, in their answer to the cross-bill, impliedly, it is true, but by necessary implication, admit that these prices were unconscionable. On page of transcript they say:

"And, finally, if the special contract is to be set aside as invalid for any reason, and if Partee & Stansell are to be compensated according to the cash value of the work at the time, then respondent says that no responsible contractor could have undertaken the work at the time for less than 45 cents per cubic yard for the work at the pass and between there and Delta, nor for less than 30 cents for the other work, payable monthly, in cash, as the work pro-

gressed. At this rate, the work done would have been worth the sum of $325,840.00, as follows, to-wit:

217,000 yards at 45 cents	$ 97,650 00
737,300 yards at 30 cents	221,190 00
Clearing 200 acres, say $35	7,000 00
	$325,840 00

That is to say, $106,536.63 less than the amount allowed by the master.

These facts conclusively show "a job." Complainants endeavor, by the ingenious special pleading of counsel, to evade their force, and in that endeavor advance the following propositions in their O. Bill and their answer to cross-bill.

1st. They insist "that the question whether they could have afforded to do the work for less is wholly irrelevant and immaterial." That I grant; but it is not the question sprung. The true question is, what was this work worth to do? and were such agreements made in the premises as show either a fraud on the law of 1871, or an unconscionable bargain. Neither of those questions is immaterial.

Complainants are not *bona fide* holders of levee bonds seeking recovery on them, but are parties to the original contract, *seeking the specific enforcement of it.*

2nd. That, having received the benefit of the contract, the Board of Levee Commissioners are estopped to aver the want of power to make said contract. To that proposition there are two answers. First, we do not seek to avoid paying for the work done, but only say that Partee & Stansell are already paid, and over paid; and that the contract can not be specifically enforced to the extent that it was unconscionable, or was unlawful, as being in fraud of the act of 1871, Partee & Stansell being parties thereto. Secondly, complainants, in the cross-bill, who are the appellants herein, are not the individuals, or the body, who made the contract in question, but a distinct board, specially

organized by the act of 1876, to wind up the affairs of that body. See ante, page //.

In conclusion, I have to say that, taking the amounts of work done to be accurately stated by the commissioner, and granting *arguendo* that the bonds ought to have been paid out at 90 cents on the dollar, Partee & Stansell are enormously overpaid.

802,170.30 cubic yards at 27 cents	$216,616 03
96,000 cubic yards at 40 cents	38,400 00
200 acres clearing and grubbing at $30	6,000 00
Total	$261,016 93
Credit, $387,800 bonds at 90 cents	349,020 00
Amount overpaid	$ 88,003 97

Respectfully submitted,

H. P. BRANHAM,
Solicitor for Appellants.

16-399

SUPREME COURT U.S.
FILED
NOV 28 1882
JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

W. L. HEMINGWAY, et als., Appellants,

No 298. *vs.*

J. W. STANSELL, Survivor. Appellee.

Appeal from the District Court for the Northern Dist. of Mississippi.

Printed by Tracy & Co., 299 Main St.,

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} Appeal from the District Court for the Northern Dist. of Mississippi.

STATEMENT OF CASE.

The Legislature of Mississippi, by an act entitled "An act to redeem and protect from overflow from the Mississippi river, certain bottom lands herein described," approved March 17, 1871, created a Levee District, by the corporate name of "The Levee Board of the State of Mississippi, District No. 1," for the purpose of constructing and repairing a levee along the river front of the counties of De Soto, Tunica and Coahoma. To constitute a board to carry on the work, the counties named above, and also the counties of Panola and Tallahatchie, were authorized each to appoint one commissioner; and the five commissioners so chosen, and their successors, were created a body politic and corporate by the above name, with power to elect a president, secretary, treasurer, and other officers and agents. The whole act is printed in the record, commencing on page 36.

By the third section, the Board of Levee Commissioners was invested with power to contract for, repair and maintain a levee, and to rebuild, strengthen and elevate the old levee, so as to protect and redeem the lands in the District from overflow.

The eighth section imposed a uniform charge and assessment of two per cent. on the value of all the land in the District, to be collected annually for twelve successive years, for the purpose of

building, repairing, constructing and maintaining the said levees and works, and for carrying into effect the objects and purposes of the act.

The ninth section authorized the said Board of Levee Commissioners to borrow money to enable them to carry out the purposes of the act, and, to that end, to issue their bonds to the amount of one million of dollars, bearing interest not exceeding eight per cent., and payable not less than two nor more than ten years after January 1, 1871. In reference to these bonds, it is provided that, "said bonds shall be negotiable as promissory notes or bills of exchange, and may be sold and negotiated in any market in or out of the State, on the best terms that can be obtained for the same, but in no case shall any of them be negotiated or sold at a greater discount than ten per cent."

Having organized in pursuance of the law, said commissioners proceeded to let out the contracts for the work to the lowest bidder, inviting the public to compete for said work by submitting bids and proposals for its performance.

Partee & Stansell made a bid for a portion of the work, and fixed prices at which they proposed to receive payment in the bonds of the Levee Board at the rate of ninety cents in the dollar. A copy of this bid is contained in the record, page 100.

This bid was accepted, and a contract entered into accordingly, which is copied on page 17 of the record. By this contract the work was "to be finished as described in the specifications, and agreeably to directions from time to time of the chief engineer" of the Levee Board.

The "specifications" alluded to are found twice in the record, first, commencing on page 18, as Exhibit C of complainant, and again on page 50, as an Exhibit to the answer of defendants. These specifications require the work to be done under the control, and according to the directions, of the chief engineer of the Levee Board. He was to make all the measurements and estimates of the work; to accept it if satisfactory, or reject it; and, by the last clause, his decision was made final and conclusive on the rights and claims of the parties in any dispute that might arise between them.

Monthly estimates were made by the engineer, and partial payments were received as the work progressed; and the entire work was completed to the satisfaction of the engineer, and was accepted

by him as such, and a final estimate was made of the quantity, character and value of the work, as provided in said specifications, and returned by said engineer to the said Board.

This final estimate Partee & Stansell were never permitted to see. The engineer declined to furnish them a copy, but he read out the results to Stansell at Friar's Point, and to Partee at Memphis, and they both noted down the amounts as given to them.

It is unnecessary to enter upon the particulars of the conduct of the Levee Board that led to the present suit. They are stated in the bill, and proved by the depositions of Partee & Stansell, and by the voluminous correspondence contained in the record, pages 56 to 69, and 109 to 118.

The bill in this case was filed for the purpose of compelling the defendants to pay for the work done, by delivering bonds for the amount at ninety cents in the dollar, in pursuance of the contract, and in the meantime to enjoin them to retain in their hands a sufficient amount of said bonds to satisfy the demand of plaintiff.

The injunction was granted to the extent of $75,000 of bonds, but to stand dissolved on defendant's giving bond with security, in the penalty of $40,000, conditioned for the payment of any sum awarded or adjudged in said cause in favor of the plaintiff against the said defendants. Record, 69, 70.

The President of the Levee Board induced the clerk of the court to accept a straw bond, with sureties utterly insolvent and worthless, and without the condition required by the order; procured from the clerk a certificate that a sufficient bond for the dissolution of the injunction had been filed and approved; and thereupon immediately issued the remaining bonds up to the full sum of one million dollars to other parties. Record, 71 to 82.

The cause progressed to a decree. The defendants offered no proof; did not examine a single witness; and made no effort to establish any one of the allegations of their answer.

After hearing, and a reference to a commissioner, it was ascertained and reported that a balance of $109,988.41 remained due to Stansell, as survivor of Partee and Stansell. Record, 147.

Defendants filed exceptions to the report, on the ground that the account ought to be stated on the basis of the cash market value of the bonds at the time when they should have been delivered, in June, 1872. Record, 148.

This exception was sustained by the court, and the decree was reduced to the cash market value of the bonds in 1872, which was agreed to have been sixty-five cents in the dollar; and the final decree was rendered on the 19th of June, 1879, against the Levee Board by its corporate name, for the sum of $71,623.67 and costs. Record, 149.

A petition for appeal from this decree was filed by Hemingway & Gwin, in their individual names; a bond for costs only given and approved, and appeal granted, September 2, 1880. Record, 157–164.

The intermediate proceedings, from page 150 to 157 of the record, are improperly embodied in it, being the execution and other proceedings subsequent to the decree.

While this suit was pending, the Legislature of Misslssippi passed an act entitled "An act to abolish the Levee Board of District No. 1, and to pay the debts of said Board," approved April 11, 1876, (Acts of 1876, page 174), by the first section of which it was enacted, "That the offices of Commissioner, Secretary, Treasurer, and Collector of Levee District No 1, as now existing and organized under the laws of this State, approved March 17, 1871, be and the same are hereby abolished, and that the Auditor of Public Accounts, and the Treasurer of the State, be, and they are hereby constituted the Levee Board of District No. 1, *ex officio*, with no other salaries, perquisites, or emoluments, than now pertain to their respective offices. They shall be responsible on their official bonds for the safe-keeping and proper management of the levee funds of said District, and discharge all the duties of Levee Board, secretary and treasurer of same, and all laws and parts of laws touching the levee fund of District No. 1, the collecting and disbursement of the tax levied on account of said District, shall operate and be as binding upon them as upon the Commissioners, Secretary and Treasurer of said District. It being the intent and purpose of this act to substitute the Auditor of the State and the Treasurer thereof, *ex officio*, as such Commissioners, Secretary, and Treasurer, in place and stead of the Board of Levee Commissioners, Secretary and Treasurer of Levee District No. 1, now in office."

The other sections of this act relate to the continued collection of the assessment made by the act of 1871, and the application thereof to the payment of the debts of the Board.

After the passage of this act, the counsel for defendants, at June term, 1877, moved the court to dismiss the bill, because "said Levee Board of District No. 1, the defendants herein, had by a legislative enactment of the State of Mississippi, (referring to said last-named act) been abolished, and was no longer capable of suing or being sued in a court of justice." This motion was overruled. Record, 87.

The opinion of the court overruling this motion is contained in the record, page 165.

The appellants assign the following alleged errors, to-wit:

1. The refusal to dismiss the suit on the motion of the counsel for the Levee Board.

2. Disregarding the receipt in full of June 18, 1872, and directing an account on any basis.

3. Allowing ten per cent. discount on the bonds paid Partee & Stansell.

4. Allowing the account to be stated on a basis of 45 cents and 65 cents per cubic yard for earthwork, instead of the proper basis of 27 cents and 40 cents respectively, and of $45 per acre for clearing and grubbing, instead of $30.

BRIEF FOR APPELLEE.

I.

The first point relied on by the appellee is, that the proper parties are not before the court to authorize an inquiry whether the decree of the court below was erroneous or not.

The only parties before the court are William L. Hemmingway, Treasurer of the State of Mississippi, and Sylvester Gwin, Auditor of said State, as appellants, and J. W. Stansell as appellee.

The petition for appeal, which occupies six pages of the printed record, from page 157 to page 163, and which is addressed to the Supreme Court of the United States, commenees thus:

"The appeal of William L. Hemingway, treasurer of the State of Mississippi, and Sylvester Gwin, auditor of said State, and *ex officio* the Levee Board of Mississippi, District No. 1, appellants in this cause, respectfully showeth."

After reciting at great length the proceedings in the case, and showing the recovery of "a decree against said Levee Board of Mississippi, in favor of said J. W. Stansell, surviving partner of Partee & Stansell, for $71,623.67," the petition concludes as follows.

"Wherefore the appellants appeal from the whole of said decree of the District Court of the United States, and respectfully pray," &c.

The Levee Board itself is not a party to the appeal. Hemingway, treasurer, and Gwin, auditor of the State of Mississippi, describing themselves as being "*ex officio*, the Levee Board of Mississippi, District No. 1," are the only appellants. It will be presently seen that this description of themselves is wholly unwarranted in law and fact. They are not, and never were, "*ex officio*," the corporation known as the "Levee Board," &c.

The "Levee Board of Mississippi, District No. 1," is a corporation created by the act of the Legislature, hereinbefore referred to. The first section provides as follows, to-wit:

"Section 1. *Be it enacted by the Legislature of the State of Mississippi*, That a Board of Commissioners, to be styled "The Levee Board of the State of Mississippi, District No. 1," to consist of five members, one of whom shall reside in each of the counties of Tunica, Coahoma, Tallahatchie, Panola and De Soto, shall be elected by the Board of Supervisors of their respective counties, and they, and their successors in office, shall constitute, and are hereby declared to be a body politic and corporate, by the name and style aforesaid; and by said name may sue and be sued, plead and be impleaded, contract and be contracted with, and have perpetual succession, for the purposes hereinafter designated." The section goes on to allow the Board to elect a president, treasurer, secretary, engineer, and other officers and agents. Pamphlet acts of 1871, page 37.

It is very plain that it was not intended by the first section of the act of April 11, 1876, entitled "An act to abolish the Levee Board of District No. 1, and to pay the debts of said Board," to do more than to abolish the offices of commissioner, secretary, treasurer, and collector, as then existing under the act of March 17, 1871, and to substitute the Auditor and Treasurer as such commissioners, secretary and treasurer, in place and stead of those officers then in office.

When this act says "that the Auditor of Public Accounts and the Treasurer of the State are hereby constituted and appointed the Levee Board of District No. 1, *ex officio*, with no other salaries, perquisites, or emoluments than now pertain to their respective offices,"

it evidently means only that these officers of the State are appointed officers of the corporation already existing, instead of the officers then constituting the Board of officials for the management of its affairs. The name of the corporation was not changed, nor were the Auditor and Treasurer created a corporation by the old name.

The five commissioners in office when the bill in this cause was filed, were made defendants to it for the purpose of discovery only. They were not necessary or proper parties for any other purpose, as no relief was sought against them.

The revival of the suit against the new commissioners, after the passage of the act of 1876, was altogether unnecessary. If, by virtue of that act, the Auditor and Treasurer became the *corporation itself*, they were already parties; and if they only became commissioners or directors to administer the concerns of the corporation. they were not proper parties. But, out of abundant caution, the suit was revived against them, not however as being the corporation, but only as the agents and officers thereof.

And if the Auditor and Treasurer of the State became, by force of the act of 1876, the corporation itself, they nevertheless could only sue and be sued by and in the *corporate name*, and not by or in the individual names of the corporators.

On this point, then, we insist,

1. That the decree being against the Levee Board by its corporate name and in its corporate character, an appeal from it can only be prosecuted in the corporate name.

2. That, inasmuch as there is no decree whatever, not even for costs, against Hemingway and Gwin, individually, or as commissioners of the Levee Board, they cannot possibly be injured or aggrieved by the decree, and therefore that they, although parties to the cause, cannot in their own names, either as individuals or as commissioners, officers, or corporators of the Levee Board, prosecute an appeal. 2 Jac. L. D. 401. Co. Litt. 288 b. Tey's case, 5 Rep. 38,

If Hemingway and Gwin have such an interest in, or are so far affected by the decree, that they may, in their individual names, prosecute an appeal, nevertheless they cannot do so without the Levee Board joining in the appeal, or without a proceeding in the nature of a summons and severance in the court below. Todd v. Daniel, 16 Peters, 521. Smith v. Clark, 12 How. 21. Mussina v. Cavazos, 20 How. 289.

We submit that, upon this record, the court can neither affirm nor reverse this decree, so far as the "Levee Board of the State of Mississippi, District No. 1," is concerned, and inasmuch as the appellants have no interest in it, and are not affected by it, that the appeal must be dismissed.

II.

Appellants insist that the court below erred in overruling the motion to dismiss the suit, on the ground that the Levee Board had been abolished, and was no longer capable of suing or being sued.

If the postulate were true, a motion to dismiss was not the proper mode to take advantage of it. Assuming that there was no longer any party defendant, the court could not have made a decree dismissing the bill. All that could properly have been done was to suggest the civil death of the defendant corporation, and to cause an entry to be made of the abatement of the suit. So the court committed no error in overruling the motion to dismiss.

But the postulate was not true; the corporation had not been abolished.

The argument of appellant's counsel must rest upon the language of the title of the act of April 11, 1876, "An act to *abolish* the Levee Board of District No. 1, and to pay the debts of said Board."

The title is no part of the statute, and although it may sometimes slightly assist in removing ambiguities, it is a very unsafe guide in ascertaining, even in the most general way, the scope and purport of the act. Dwarris on Stat. 653, 654.

But there is no ambiguity in the body of the act in question. The act of March 17, 1871, created a public corporation by the name of "The Levee Board of Mississippi, District No. 1," for certain purposes, and with certain powers, and provided certain officers, styled "commissioners," by whom the corporate affairs were to be managed and conducted. These commissioners in their collective capacity constituted, when assembled, a "Board," which word, in this sense, is defined to be, "a number of persons who have the management of some public office or trust, or who superintend the operations of any private business; as, a board of directors," &c., (Worcester's Dict. tit. Board). These commissioners, when assembled as a Board, had the power to appoint certain other officers, as secretary, treasurer and collector of taxes.

The act of 1876 purports only to abolish these "*offices* of commissioners, secretary, treasurer, and collector," as *then* existing under the act of 1871, and to devolve the powers and duties appertaining to them on the Auditor and Treasurer of the State, *ex officio*. The last clause of the first section expressly declares as follows, to-wit: "It being the intent and purpose of this act to substitute the Auditor of the State and the Treasurer thereof, *ex officio*, as such commissioner, secretary and treasurer, in place and stead of the Board of Levee Commissioners, secretary and treasurer of Levee Distriet No. 1, now in office.

The corporation is not abolished, but only the old officers; and new ones, in the interest of economy, are provided in their place. There is no repeal of the act of 1871. Only "all acts and parts of acts in conflict with the provisions of this act," are repealed. The continued existence of the corporation is not only not in conflict with the act of 1876, but is absolutely necessary to the operation of the act itself. Its declared object is to pay the debts of the Board, and to liquidate its outstanding liabilities. Without a party liable to be sued, there could be no legal remedy to ascertain these debts and liabilities. Certainly it was not intended that the Auditor and Treasurer should be invested with the absolute power to determine finally what debts and liabilities should be recognized and paid. The Court will not impute to the Legislature so unrighteous a purpose, without the clearest necessity. The effect of appellant's position, if successful, would be to deprive complainant of all remedy, and thus to extinguish his claim.

It would have been sufficient to rest this point on the opinion of the able and discriminating Judge who decided it on the court below. See Record, page 165.

III.

On the merits of the case, if they can be inquired into on this appeal, the third and fourth errors assigned seem to resolve themselves into a single question.

That the decree, in the particulars complained of, is in exact accordance with the contract as entered into between the parties, does not admit of dispute.

The condition that the bonds would be taken at 90 cents in the dollar was in the written bid, which was accepted; but was omitted

in drawing the contract. This omission was afterwards corrected by order of the Board, and the omitted words were inserted.

In pursuance of the contract, the bonds paid to Partee & Stansell, were paid to them at the rate of ninety cents to the dollar. The Board voluntarily made such payments, and never claimed anything more.

The contract stipulated for 45 and 65 cents per cubic yard, and $45 per acre for clearing, and the court could not have allowed less, without making a new contract for the parties.

The position taken by counsel seems to be that the principal power given by the ninth section of the act, is the power to "borrow money," and that the power to issue bonds is only given as subsidiary "to that end," and that bonds can be issued only for "borrowed money." Hence the conclusion is drawn that the contract to issue the bonds directly to contractors, in payment for work done, is illegal and void.

This is too narrow a view of the statute. It is expressly provided that said bonds shall be negotiable as promissory notes or bills of exchange, and "may be sold and negotiated in any market in or out of the State, on the best terms that can be obtained for the same." This is not language descriptive of a borrowing of money, but rather of the sale and disposition of a chattel. It does not, in terms, require the bonds to be sold for money, but is broad enough to cover any disposition of them in exchange for anything that might be of use in the construction of the levee. The section goes on to require the bonds "issued and *sold or used*" to be registered, and that "all moneys borrowed by said Board, or arising from the negotiation or sale of any of the bonds," shall be paid into the treasury, thus showing that there was a distinction between money borrowed, and proceeds arising from the sale and negotiation of the bonds.

The levees had been destroyed during the war; the country had been overflowed for several successive years; the object contemplated by the act was of pressing importance, and the emergency was imminent. In these circumstances great latitude of discretion was necessarily given to the Levee Board. To have then given a limited and strict construction to the powers of the Board, would have defeated the object, and left the country to another deluge.

We think it clear that the power in this instance was well executed by the agreement to deliver the bonds directly to the contractors in payment for work, without the circumlocution of first selling the bonds, and then handing over the money.

It has been held by this court, that under a power to a municipal corporation to issue bonds for the purpose of borrowing money, in order to pay a subscription for stock in a railroad company, the bonds themselves may be issued directly to the railroad company in payment for the stock. Meyer v. Muscatine, 1 Wall. 384, 392 Rogers v. Burlington, 3 Id. 654, 666.

Similar rulings have been made in some of the State courts. Commonwealth v. Pittsburg, 34 Pa. St. 496. Same v. Alleghany Co. 37 Id. 237. Reinboth v. Pittsburgh, 41 Id. 278. Griffin v. Inman, 57 Geo. 370.

The courts of New York, in construing one of its statutes, reached a different conclusion, and the question came twice before this court whether these State decisions were controlling here, as the interpretation of a State statute by its own court of last resort.

In Venice v. Murdock, 92 U. S. 494, 501, the court refused to follow them, saying of these New York decisions, in an opinion by Mr. Justice Strong: "They assert general principles; to-wit, that persons empowered to borrow money, and give bonds therefor, for the purpose of paying it to an improvement company, are not authorized to deliver the bonds directly to the company; a *doctrine denied in this court,* in the Supreme Court of Pennsylvania, and even in the Court of Appeals of New York. People v. Mead, 24 N. Y. 124; Venice v. Woodruff, 62 Id. 462."

But in Scipio v. Wright, 101 U. S. 665, 673, the same eminent Judge, in delivering the opinion of the court, again reviewed these New York cases, and without alluding to what had been said in Venice v. Murdock, came to the conclusion that, being constructions by the highest court of New York, of the *identical statute* under consideration, they must be followed as a guide by this court. The learned judge, however, says, "were the question an open one, it would seem that it ought not to be a defence;" and he shows that the issuing of the bonds directly to the railroad company is practically a good execution of the power, and the same in legal effect as if the money had been borrowed by the town, directly, and paid over to the company.

We may conclude, therefore, that Meyer v. Muscatine and Rogers v. Burlington assert the settled doctrine of this court, except when obliged to follow the State courts in their construction of State statutes.

Almost the identical question involved in the present case has been adjudged in our favor in New York; to-wit, that a railroad corporation, having power to build a road, and to issue bonds to raise money therefor, has the power to issue to contractors in payment for work done, negotiable certificates of indebtedness payable in money *or bonds.* Pusey v. N. J. R. Co. 14 Abbott's Pr. N. S. 434.

In Kennicott vs. Supervisors of Wayne Co. 6 Bissell 138, there was a question as to the validity of certain bonds of the Mount Vernon Railroad Company. It appears by a report of the case in 16 Wallace, 452, that these bonds were issued under a charter which authorized the company to borrow money, and provide security therefor, by bond and mortgage or otherwise. The disputed bonds were issued under this power by the treasurer of the company, to certain boot and shoe dealers, for goods sold to the company.

Judge Drummond overruled the objection, saying: "It may be that certain goods were as valuable for the construction of a railroad as money itself; for example, iron, or any of the materials which would go into the construction of the road. So any goods which could be transferred to, or used by, the operatives of the road, and which would be received by them in compensation for their services which they had or might render, would he just as valuable as money."

This ruling is fully in point to sustain the issuance of the bonds directly to contractors in payment for work done.

Again, it is contended that the provision of the ninth section forbidding the negotiation or sale of the bonds at a greater discount than ten per cent., was violated by the contract.

The argument is, that the contractors would have done the work at lower rates if paid in cash, than when paid in bonds, and that this difference is to be regarded as an additional discount on the bonds.

This is an erroneous view of the question. The difference between payment in cash and in bonds did not enter into the nego-

tiation at all. The cross bill alleges (Record, 132) and the answer thereto admits, (page 138), that the Levee Board proceeded to advertise for bids of contractors for performing the work. It does not appear that this advertisement said anything about the mode of payment, whether in money or in bonds. Partee & Stansell submitted their bid in writing. It was a simple proposition to perform certain work for certain prices, and to receive payment in the bonds of the Board at ninety cents in the dollar. This proposition was accepted, and the contract drawn and executed. The provision respecting payment in bonds at ninety cents was at first omitted, but it was a part of the agreement, and the written contract was afterwards corrected in this respect.

It was a plain offer by Partee & Stansell, made in their own interest, whereby they proposed to assume all the risk of the negotiation and sale of the bonds. There was no device or trick to evade the law.

If there were lower or more advantageous bids, or if the terms offered appeared unreasonable, the Levee Board had the right to reject this one altogether. But as it was accepted, it is to be presumed that it was the most favorable proposition they received.

If there was any device, contrivance or intention, to evade the provisions of the law, which is denied in the answer to the cross bill, (Record, 143), the five commissioners of the Levee Board were alive to prove it; and they are silent.

The contract was freely entered into on both sides, and it cannot now be avoided as *ultra vires*, because it is conjectured that the price agreed to be paid was nominally greater than the work would have cost, had the Board raised the money, and paid for it in cash.

A contract cannot be avoided as unlawful on suspicion or conjecture; the illegality, whether of act or intention, must be established by proof.

The case of the White Water Valley Canal Co. v. Vallette, 21 Howard 414, is very similar to the present, and is a strong authority in favor of appellee. In that case there was power given by the charter to borrow money, and to give bonds therefor, but there was no express restriction upon the rate of interest or discount at which they might be negotiated. The company contracted with Vallette to complete the work, and agreed to issue to him in payment their bonds in double the amount of the estimated value of the work.

The work was done at a cost of $56,000, and the bonds to the amount of $112,000, were issued to Vallette, reciting that they were issued under the charter, and were for a loan of money.

It was contended that these bonds were invalid, because in violation of the general interest law of Indiana, which regulated the rate at which the bonds might be issued or sold, as much as if it had been re-enacted in the charter.

The court overruled this defence, and held that there was no loan in fact; and, if it was a loan, there was no *certain gain* stipulated for beyond legal interest. It was further held that there was no testimony to support the averment of a device or contrivance to evade or elude the prohibition of the statute. This case seems fully to cover the present.

Furthermore, in this aspect of the case, the question is one of usury, —of taking unlawful interest or discount.

In Mississippi, contracts for a greater rate of interest than that allowed by law, were not made void, but only the excess over ten per cent. might be forfeited on the plea of the party to be charged therewith. Miss. Code of 1857, page 370, art. 1

No change in this respect was made by the Code of 1871, §2279, but this latter Code did not supersede the Code of 1857 until October 1, 1871, and the contract in question is dated September 28, 1871.

And it is well settled in that State that where a corporation makes a contract for interest or discount, at a rate which is expressly prohibited by its charter, such contract is not void, unless expressly so declared by the charter, but is to be governed by the general interest law of the State, and only subjected to such penalty as that law imposes. Commercial Bank v. Nolan, 7 How. 508. Grand Gulf Bank v. Archer, 8 S. & M. 151.

Such is believed to be the generally accepted doctrine on the subject. Morawetz on Corp. §41.

The case last cited, Grand Gulf Bank v. Archer, assumes the advanced position, for which we shall presently contend, that if a corporation makes a contract which it is prohibited from making, that constitutes no defence to the parties contracting with it, if they have received the consideration of the contract.

We shall insist that the converse of the proposition is equally true, and that the corporation cannot defend on that ground when

sued on the contract, provided it has received and retains the consideration.

The above case shows that such is the law of Mississippi.

It is also the doctrine in that State, that while a contract *entirely foreign to the purpose* of a corporation may be void for want of power, yet when made in reference to a subject embraced within the granted powers, it will not be void because it exceeds them. Haynes v. Covington, 13 S. & M. 411. Littlewort v. Davis, 50 Miss. 407–8.

And this appears to be the general rule. 2 Dillon on Mu. Corp., §§749, 766. Pierce on Railroads, 501.

The true doctrine is, that a contract made in violation of the prohibition of a statute, is not void, unless so declared by the act.

In Oneida Bank v. Ontario Bank, 21 N. Y. 490, Chief Justice Comstock says: "There is no doubt a principle of the common law that illegal and prohibited contracts are void, without being so expressly declared by any statute. But there is also another principle, equally well ascertained, and more beneficial in its results, that no party shall set up his own illegality or wrong to the prejudice of an innocent person. He can set it up when the legislative power not only forbids to make the contract, but *declares it void.* But the logic of the law, and certainly its morality, are not opposed to the doctrine that the legislature may prohibit the contract, and punish the guilty parties, and yet leave the contract to stand in favor of innocent persons, not included in the terms of the prohibition."

It was on this principle that the case of Harris v. Runnels, 12 How. 79, was decided.

Following in this direction, Judge Swayne in National Bank v. Matthews, 98 U. S., 525, says: "Section 5136 does not, in terms, prohibit a loan on real estate, but the implication to that effect is clear. What is so implied is as effectual as if it were expressed." And on page 627, he further says, "The statute does not declare such a security void. It is silent upon the subject. If Congress so meant, it would have been easy to say so." Here a contract was forbidden by statute, and yet the court held it valid, and enforced it, because the statute did not declare it void. Morawetz on Corp. §45.

The case of Penn v. Bornman, decided by the Supreme Court of Illinois, in June, 1881, is to the same effect. 12 Reporter, 297.

13 Chicago Legal News, 383. 11 Cent. Law J. 83. See, also, Gold Mining Co. vs. National Bank, 96 U. S. 640. Pangborn v. West lake, 36 Iowa 546.

But, conceding for the argument, that the contract in question was both prohibited and declared void by the statute, we insist that the Levee Board is estopped from setting up the defence of illegality, or *ultra vires*, against this action.

The defence of *ultra vires*, although admitted as a theory, yields readily to considerations of equity and fair dealing; and a party who wrongfully seeks to take advantage of it, is held to be estopped from setting it up as a defence. Pierce on Railroad Law, 500, 516.

The doctrine of *ultra vires*, whether invoked for or against a corporation, is not favored in the law. It should never be applied where it will defeat the ends of justice, or work a legal wrong. Railway Co. v. McCarthy, 96 U. S. 267. San Antonio v. Mehaffy, Id. 315. Hitchcock v. Galveston, Id. 351.

The well-settled modern doctrine is, that where the corporation has received the consideration, and the contract has been fully executed, so that nothing remains to be done by the other party, it cannot set up the defence of *ultra vires* when sued on the contract, but is estopped at law and in equity. Field on Corp. §258 to §273. Green's Brice's Ultra Vires, 372 and note. Herman on Estoppel, §542, §320. Pierce on Railroad Law, 516-17. Whitney Arms Co. v. Barlow, 63 N. Y. 70. Parish v. Wheeler, 22 N. Y. 494. Gas Co. v. San Francisco, 9 Cal. 453. Pennington v. Taniere, 64 Eng. C. L. 1012.

A recent writer on this subject, while recognizing the rule as contended for, rests it on the ground of public policy, and not upon any principle of the technical doctrine of estoppel. This view perhaps places it upon the most satisfactory foundation. Morawtez on Corp. §§30, 31, 100-111.

In all cases of executed contracts, corporations will be bound by their acts, and will not be permitted to disavow them, where others have been induced by them to enter into onerous engagements. Zabriskie v. Railroad, 23 How. 400-1. Bissell v. Jeffersonville, 24 Id. 299, 300. Railroad v. Howard, 7 Wall. 413. Pinegrove v. Talcott, 19 Id. 678. Bradley v. Bullard, 55 Ill. 417. Adams v. Railroad, 2 Coldwell, 661. Sedg. Stat. and Const. Law, 90.

In Steamboat Co. v. McCutcheon, 13 Pa. St. 13, where a corporation set up the defence of *ultra vires* to an action for the rent of premises used as an office, Judge Coalter said: "Some things lie too deep in the common sense and common honesty of mankind, to require either argument or authority to support them, and this, I think, is one of them."

This language is quoted with approbation by Judge Swayne in County of Macon v. Shores, 97 U. S. 279.

This doctrine of estoppel applies to public and municipal corporations, as well as to all others. Thomas v. Richmond, 12 Wall. 356-7. Mayor &c. v. Ray, 19 Id. 468. Gelpcke v. Dubuque, 1 Id. 202. Coloma v. Eaves, 92 U. S. 490.

Indeed the doctrine has had its most frequent application in cases of municipal corporations.

In this case, the complainants performed their work faithfully: the people of the District have ever since reposed in security behind the protection of these levees, until the disastrous flood of 1882 overtopped them; the justice of the claim is clearly established; and there is no reason in law or morals why it should not be paid.

IV.

Appellants further insist that the court erred in disregarding the receipt in full of June 18, 1872, and in decreeing an account on any basis.

In reference to this receipt, the bill shows that after the work was completed, the defendants owed complainants, according to the estimates and returns of the chief engineer, over $200,000, which they refused to pay, but procured a false and fraudulent estimate to be made by another engineer, by which the balance was reduced to $86,800. This balance the Levee Board refused to pay, except on the condition that Partee & Stansell would sign an acquittance or receipt in full; which they did, protesting at the same time, that they did so from necessity, and not of free will, and declaring that the same was without consideration, and not binding, and asserting their intention to resort to the courts for redress. Record, pp. 6 and 7.

The defendants, in their answer, set forth what they say is a copy of this receipt, but they have never produced or proved the

original; and they deny the duress and the protest. The pretended copy is as follows:

MEMPHIS, June 18, 1872.

Received of A. R. Howe, treasurer Mississippi Levee Board, District No. 1, forty-seven thousand eight hundred dollars, on account of work on levee, the same being in full of all demands to date.

$47,800.00. PARTEE & STANSELL, Contractors.

The only proof contained in the record, relating to the subject, is found in the answer of J. W. Stansell, to the seventeenth interrogatory, as follows:

"The Levee Board refused to settle with us according to Kirkpatrick's estimates, and sent B. Mickle, as special engineer, to make an estimate of the work. Mickle returned them an estimate considerably lower than that of Kirkpatrick, and though Mickle's estimate showed the Board to be indebted to us in the amount specified in the receipt, the Board refused to pay any part of what they admitted to be due us, unless we would sign a receipt in full of all demands to date. The creditors of Partee & Stansell were then clamorous for pay, and we were obliged to have what the Board offered to pay; and in order to get it, we were obliged to sign that receipt; but it was done under express protest on our part that we would not acquiesce in it as a final settlement; that we signed it under compulsion, and would demand all our legal rights.

"We in fact did not acquiesce in it, but pressed our claims before the Board, and to the individual members of it, until they finally entered into the agreement of October 4, 1872, by which the whole matter was referred to a board of arbitrament, as provided therein." Record, page 99.

This agreement of October 4, 1862, is exhibit B to complainant's bill. (Record, pp. 17, 18.) By it the parties agreed that a new measurement and estimate of the entire work should be made by three engineers, of whom Mickle, who as special engineer had made the estimate of which Partee & Stansell complained, and who had after that been promoted to be chief engineer of the Board, should be one, and who should have an equal voice with an engineer to be named by P & S. in the choice of the third. The parties were to be bound by the result of this measurement.

This Board of engineers was organized by the selection of Fleece and Cobb, and proceeded for some days with the work, when it becoming evident that the original estimates by Kirkpat-

rick would be sustained and verified, the Levee Board, and their chief engineer, resorted to most discreditable methods to break up the board of arbitrament, and defeat the prosecution of the work; in which they succeeded.

Now, in view of these facts, the question is raised as to the effect and operation to be given to the alleged receipt of June 18, 1872.

1. In the first place, the receipt itself was not produced or proved, and its contents were not established by any testimony. No discovery was prayed in respect to it, nor was its production demanded by the bill. Complainants alleged the existence of some such paper, averred their inability to state its terms, and showed its invalidity, leaving defendants to produce and rely on it if they saw proper, or to waive it altogether. Defendants chose the latter course, and this alleged receipt was not produced, or in any manner insisted or relied on, in the court below.

2. A receipt is not an estoppel. It is a mere admission, inconclusive in its character, and may be explained and contradicted. 1 Greenleaf Ev. §212, 305. 3 Starkie Ev. 1272; Receipt. 2 Pars. Con. 555.

The rule has been clearly stated in a recent case by the Court of Errors of New Jersey. "That receipts, although *prima facie* evidence of payment and acquittance of a debt, are always open to explanation and contradiction by any kind of appropriate evidence, is a proposition too well settled to admit of discussion. It is no less undoubted law, that an estoppel against the enforcement of an obligation, will not arise upon receipts untruthfully acknowledging satisfaction thereof, unless the party claiming the estoppel has been induced, by knowledge of such receipts, to place himself in a position, or to adopt a course of conduct, which would render it inequitable to enforce against him the obligation thus apparently satisfied." Swain v. Frazier, 8 Stewart, N. J., 14 Reporter 278.

This receipt is not under seal, but the addition of a seal would not, under the law of Tennessee where it was given, have affected its character in any respect. Code of Tenn. §1804.

3. Payment of part of a debt is no satisfaction of the whole, even where the creditor agrees to receive a part for the whole, and gives a receipt for the whole demand. 2 Pars. Con. 618.

But this rule will not apply to the case of a fair and well-understood compromise, carried faithfully into effect. Id.

In this case there was no compromise, but the receipt in full was extorted as a condition of the payment of an amount admitted to be due, in the face of the earnest protest of the creditors that they would not acquiesce in it as a final settlement; that they signed it under compulsion, and would demand all their legal rights.

4. If this receipt ever had any conclusive character, it was waived by the agreement of October 4, 1872, whereby the estimate of Mickle was abandoned, and the Levee Board agreed to pay whatever might be found due on a new measurement and estimate by engineers selected for that purpose.

This was a complete waiver and abandonment of the receipt as a final settlement and full payment, and when the Board afterwards, in the most disreputable manner, defeated the execution of this last agreement, they necessarily remitted the complainants to all their original legal rights.

On the whole case, we submit that there is no error in the decree, to the prejudice of the appellants.

H. T. ELLETT, Counsel for Appellee.